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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

JAN DONALDSON and MARY ANN GUGGENHEIM, MARY LESLIE and STACEY HAUGLAND, GARY STALLINGS and RICK WAGNER, KELLIE GIBSON and DENISE BOETTCHER, JOHN MICHAEL LONG and RICHARD PARKER, NANCY OWENS and MJ WILLIAMS, and CASEY CHARLES and DAVID WILSON, Plaintiffs, v. STATE OF MONTANA, Defendant.	)	Cause No. BDV-2010-702 Hon. Jeffrey M. Sherlock **STATE'S COMBINED REPLY IN SUPPORT OF MOTION TO DISMISS AND OPPOSITION TO SUMMARY JUDGMENT**

The State of Montana replies to and opposes Plaintiffs' Response to Motion to Dismiss and Combined Brief in Support of Motion for Summary Judgment. Plaintiffs have failed to state a claim upon which relief may be granted, and therefore are not entitled to judgment as a matter of law. See Mont. R. Civ. P. 56(c). The State has served the Affidavit of Dr. Craig Wilson to assist the Court in its resolution of Plaintiffs' suspect

class argument as a matter of law, but does not contend that there remains any genuine issue of any fact material to Plaintiffs' claims under applicable law. See id.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO AFFIRMATIVE LEGISLATIVE RELIEF.

Plaintiffs choose their words carefully in asking this Court to do what no Court in Montana has done. They say they seek an order "enjoining the State from continuing to exclude Plaintiffs from relationship and family status and protections" to end "the State's exclusion of same-sex couples from relationships and family status and protections." Pls' Br. at 36. They mean that the Court must either violate the Montana Constitution by recognizing as spouses couples that do not meet the constitutional definition of marriage, or rewrite at least several dozen statutes to establish a separate system of non-spousal benefits alien to Montana law. In their own words, they want the Court to "direct the State Legislature to amend the laws." Pls' Br. at 38. This is unprecedented.

The provisions of the Declaration of Rights at issue are negative rights against state action. State's Br. at 6-7. Plaintiffs cite no controlling case that has held that the failure of the State Legislature to enact their preferred legislation is itself state action subject to the limits of Article II. The "statutory exclusions" courts have invalidated in the past are just that: state laws that affirmatively exclude a class of people. See Butte Community Union v. Lewis, 219 Mont. 426, 712 P.2d 1309 (1986);

(issuing permanent injunction against implementation of welfare benefits exclusion in HB 843); Jeannette R. v. Ellery, 1995 Mont. Dist. LEXIS 795 (1st Dist. May 22, 1995) (declaring invalid Medicaid benefits exclusion in Mont. Admin. R. 46.12.2002(1)(e)); Cottrill v. Cottrill Sodding Serv., 229 Mont. 40, 744 P.2d 895 (1987) (holding workers compensation benefits exclusion of Mont. Code Ann. § 39-71-401(2)(c) unconstitutional); In re Outfitter's License of Godfrey, 193 Mont. 304, 631 P.2d 1265 (1981) (holding residency requirements of Mont. Code Ann. §§ 87-4-122, -126 unconstitutional). In each of these cases the Court invalidated a particular statute or rule that represented state action to exclude members of a constitutionally protected class, leaving the remaining statutory scheme in place.

Here, Plaintiffs do not seek the invalidation of spousal benefit laws, and cannot seek the invalidation of the only state action that potentially excludes them from receiving those benefits--the Marriage Amendment's exclusion of same-sex couples from marital (spousal) status. Unlike the cases on which Plaintiffs rely, there is no law here for the Court to invalidate beyond the Marriage Amendment, which itself is binding on the Court.

The only example Plaintiffs can find for the unprecedented relief they seek is inapt. Pls' Br. at 38. The school funding cases are easily distinguishable by the constitutional text at issue in them, which "explicitly requires" legislative action: "[t]he legislature ***shall*** provide a basic system of free quality public elementary and secondary schools," and "***shall*** fund and distribute . . . the state's share of the cost." Mont. Const. art. X, § 1(3) (emphasis added); Columbia Falls Elem. School Dist. No. 6 v. State,

2005 MT 69, ¶ 31, 109 P.3d 257. There is no similar constitutional or judicially enforceable mandate for the Legislature to provide or fund spousal benefits, let alone "relationship and family protections." Because the relief the Plaintiffs seek requires such a mandate, that should be the end of the matter under the Montana Constitution. Cf. Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (requiring expansion of benefits under preexisting domestic partnership laws, or same-sex marriage in absence of Marriage Amendment); Baker v. State, 744 A.2d 864, 887 (Vt. 1999) (acknowledging that the court's remedy requires "the Legislature to consider and enact implementing legislation").

II. SPOUSAL BENEFITS FOR MARRIED COUPLES DO NOT VIOLATE EQUAL PROTECTION.

Plaintiffs' equal protection argument, the centerpiece of their claims that they are entitled to spousal benefits on par with married couples, relies almost exclusively on selected out-of-state authority, dicta, and policy arguments. Under Montana law, however, the required analysis is well-established and clear. An equal protection challenge must prove that the groups at issue constitute similarly situated classes. See Bean v. State, 2008 MT 67, ¶ 13, 179 P.3d 524. A classification like spousal benefits, which is facially neutral with respect to the class asserting the claim, only triggers equal protection scrutiny if the law is "designed to impose different burdens" as between that class and another. Snetsinger v. Montana University System, 2004 MT 390, ¶ 16, 104 P. 3d 445.

Plaintiffs have not proven the threshold element that the spousal benefit laws are designed to impose special burdens on gay and lesbian Montanans, and therefore their challenge must fail. See Part II.A, below. Even if they could, however, that burden is a function of the Montana Constitution rather than the laws themselves. See Part II.B, below. Moreover, the recent developments in gay and lesbian rights Plaintiffs describe show that their interests are not specially disadvantaged by a current structural majority in a way that would merit heightened scrutiny and judicial interference in future political processes. See Part II.C, below. Regardless, as the Montana Constitution itself holds, marriage is a sufficiently important legal institution with which to justify the unique set of spousal benefits conferred by the Montana Code. See Part II.D, below.

A. Spouses Are Not Similarly Situated to Unmarried Couples, Regardless of Sexual Orientation.

As Plaintiffs explain, "the State has created a statutory scheme in which it restricts relationships and family protections on the basis of the legal status of marriage." Pls' Br. at 37; see also Pls' Br. at 20 ("it is the Legislature's decision to ***limit benefits to spouses*** that is being challenged") (emphasis added). The only classification at issue in the State's provision of spousal benefits is therefore a marital classification. The fact that the marital classification is limited to opposite-sex couples is a function of the Montana Constitution, and not the laws at issue. This is not a claim that the Marriage Amendment "immunizes" (Plaintiffs' term, not the State's) spousal benefits from constitutional scrutiny. Pls' Br. at 14. It is simply a plain reading of the only statutes Plaintiffs put at issue--all of which provide benefits to spouses without regard to sexual orientation. Marital status distinctions are subject to rational basis review, and Plaintiffs have not

argued that there is no rational basis for the general distinction between married and unmarried couples. See State's Br. at 10-11.

It is not, therefore, "a matter of uncontroverted fact" that "Plaintiffs' relationships and families are in no material way different from those of heterosexual couples who marry." Pls' Br. at 2. First, this misstates the record. See Pls'Br. Ex. 1, State's Resp. to Pls.' First Disc. Requests. Second, the difference between unmarried and married couples is a matter of law: unlike intimate, committed couples of any sexual orientation, married couples qualify for spousal benefits not because they are heterosexual but because they are spouses. It is the Montana Constitution that limits the status of a spouse to the marriage of one man and one woman, not any law challenged by Plaintiffs. Plaintiffs concede this, and that should be the end of the matter. See Pls' Br. at 1 ("The State Legislature has limited [the benefits at issue] to 'spouses,'" as defined by Mont. Const. Art. XIII, § 7).

The laws at issue do not discriminate against gays and lesbians any more than they discriminate against close friends and family members, unmarried older Montanans who wish to live together without sacrificing federal benefits, or any other couples that may desire spousal benefits but do not qualify as spouses because of the constitutionally-defined marriage law. Importantly, many of the domestic partnership laws Plaintiffs identify are not based solely on sexual orientation, further reinforcing spousal benefits as a marital rather than sexual orientation classification. See Cal. Fam. Code § 297(b)(5)(B) (persons over the age of 62 may qualify as domestic partners

regardless of gender); Ill. S.B. 1716 § 10 ("civil union" means a legal relationship between 2 persons, of either the same or opposite sex); Nev. Rev. Stat. § 122A.100 (domestic partners must chose "to share one another's lives in an intimate and committed relationship of mutual caring," regardless of the partners' genders); Wash. Rev. Code § 26.60.030 (persons over the age of 62 may qualify as domestic partners regardless of gender). Moreover, they do not necessarily confer the same benefits enjoyed by spouses. See, e.g., Nev. Rev. Stat. § 122A.210 (public and private employers not required to offer health care benefits to or for domestic partners).

Like all unmarried couples under Montana law, Plaintiffs "are to some extent able to make legal arrangements to protect their joint property and make medical decisions for one another, through health care powers of attorney, jointly held titles to property, and wills." Pls' Br. at 11. While Plaintiffs worry that these legal arrangements are somehow unenforceable, they do not and cannot claim that the State through its courts would not actually enforce them. Montana law does prohibit contractual relationships entered into for the purpose of achieving a prohibited civil relationship between persons of the same sex, Mont. Code Ann. § 40-1-401(4), but Plaintiffs do not challenge this law and do not suggest that it poses a barrier to their private arrangements.

Whether these arrangements "may not be respected" by private actors is irrelevant to the question of whether the State is bound to respect them as legally enforceable if and when they are put at issue in Montana courts. Pls' Br. at 12. Plaintiffs' expert has testified elsewhere that the non-spousal domestic partnership status they seek offers little guarantee that private actors will recognize spousal benefits they would not otherwise

recognize for unmarried couples. See Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 971 (N.D. Cal. 2010) (testimony of Peplau that "a domestic partnership is 'not something that is necessarily understood or recognized by other people in your environment.'"). Either way, speculation about whether private actors will respect Plaintiffs' existing contractual arrangements does not establish a constitutionally cognizable class.

B. Any Sexual Orientation Classification Is Due to the Constitution Itself.

Plaintiffs' equal protection argument is premised on the Legislature's "exclusion of Plaintiffs from statutory relationship and family protections." Pls' Br. at 18. Yet nowhere in forty pages of briefing can they cite when or where, exactly, the Legislature made a decision to exclude them "solely because of their sexual orientation. " Pls' Br. at 20. That's because it never happened. Unlike other States that provide domestic partnership benefits, there are no such general "statutory relationship and family protections" conferred by Montana law, and therefore no decision to include or exclude couples of any sexual orientation under the law. Spousal benefits are provided to "spouses," not to relationships or families otherwise defined. Pls' Br. at 10; see also nn. 5 & 7. Again, Plaintiffs' inability to become spouses is a function of the Marriage Amendment, not of the laws at issue.

Nothing in Alaska Civil Liberties Union holds to the contrary. Indeed, the parties agree that Montana already provides the separate domestic partnership status sought in the Alaska case. Pls' Br. at 17. As the Alaska Supreme Court held, however, its holding addressed "the governments' actions in their specific capacities as public employers, rather than in their broader governmental capacities." Id., 122 P.3d at 794. To the extent

Alaska law controls (and it does not), the State of Montana has fully met its requirements in its proprietary capacity, a different question from how Montanans govern themselves in their sovereign capacity through generally applicable laws. The Alaska Supreme Court did not view its opinion as reaching the latter question, and neither should this Court.

By reading the Marriage Amendment to apply to "the legal status or designation of marriage only," while also seeking spousal (i.e., marital) benefits for same-sex couples, Plaintiffs relegate the vigorously debated and newly enacted text of the Montana Constitution to empty symbolism. This reading is not supported by the Amendment's text, which refers to the legal concept of "marriage," not merely the "status or designation of marriage only." Nor is it supported by the purpose of the Amendment as suggested by both proponents and opponents in the voter information pamphlet: to prevent the courts, rather than the Legislature, from mandating the expansion of spousal benefits to couples that do not meet its prescribed definition of marriage. See State's Br. at 3 & Ex. A at 23; cf. Strauss v. Horton, 207 P.3d 48, 77 (Cal. 2009) (ballot arguments emphasized "that Proposition 8 would *not* take away 'any other rights or benefits' of same sex couples" previously accorded by domestic partnership law); Alaska Civil Liberties Union v. Alaska, 122 P.3d 781, 786 (Alaska 2005) (looking to legislative history of the Marriage Amendment). Yet this is precisely what they ask the Court to do.

Plaintiffs ignore this text and history in arguing that "the Amendment does not constrain the State from providing the relief sought here." Pls. Br. at 15. The relief Plaintiffs seek here is nothing less than spousal benefits, which are by definition "the

statutory protections and obligation traditionally associated with marriage," and the only benefits offered to couples of any sexual orientation under Montana law. Id. The parties agree that nothing in the Marriage Amendment would prevent the Legislature from creating a separate classification of domestic partnerships. Indeed, the Marriage Amendment "says nothing about limiting or restricting relationship or family protections provided by the State Legislature." Pls' Br. at 14; Pls' Br. at 17. That's the point: it is for the State Legislature, not the Court, to decide whether to create a new category of benefits beyond spousal benefits. Spousal benefits, which are the only laws at issue here, are not simply "afforded to certain couples" but are afforded solely to married couples and as such are subject to the limitations of the Marriage Amendment.

Plaintiffs' reliance on the same-sex marriage cases proves the State's point. Those cases hold that equal rights for same-sex couples cannot be achieved short of marriage, regardless of what benefits state law may provide. As the California Supreme Court explained, the legal issue it addressed was not whether same-sex couples were entitled "to enter into an official relationship" in the abstract, but whether the separate status of marriage violated the state equal protection guarantee despite the availability of separate partnership status of unmarried couples. In re Marriage Cases, 183 P.3d 384, 398 (2008); see also Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411 ("the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm" under the equal protection guarantee). In other words, Plaintiffs' argument for equality demands spousal benefits barred by the Marriage Amendment, and not some

separate set of domestic partnership benefits, like those that were already provided in California and Connecticut and held to be unequal.

Similarly, Plaintiffs' claim that they are constitutionally entitled to "some formal acknowledgment of the value and importance of [same sex] relationships," where the only formal acknowledgment of couples by the State is as spouses, is another argument that they are entitled to the formal status of marriage. Pls' Br. at 12-13. Their expert Dr. Peplau tiptoes around that unavoidable conclusion in this case, but elsewhere she has confirmed that is exactly where the argument must lead. In the Perry case, where the Plaintiffs enjoyed all the benefits of marriage except for the formal designation, she explained that domestic partnerships short of marriage do not resolve dignitary harms because "little of the cultural esteem surrounding marriage adheres to domestic partnerships." Perry, 704 F. Supp. 2d at 936; see also id. at 971 ("There is a significant symbolic disparity between marriage and domestic partnerships").

C. Sexual Orientation Is Not a Suspect Classification.

Plaintiffs concede that the Montana Supreme Court has never held that classifications based on sexual orientation are subject to heightened scrutiny. Pls' Br. at 22. Instead, they rely on an analysis, concurred in by only one justice on the Montana Supreme Court as dicta, that purposely departs from that Court's established equal protection jurisprudence. Pls' Br. at 23-24, citing Snetsinger v. Montana Univ. Sys., 2004 MT 390, 325 Mont. 148, 104 P.3d 445 (Nelson, J., specially concurring); see also id., ¶ 61 ("Sexual and gender orientation is not considered a 'suspect class'"). Plaintiffs also rely on interpretations of other state constitutions which have different texts or

histories than the Montana Constitution. Pls' Br. at 22-23; cf. Mont. Const. art. II, § 4 (providing specific protections for "race, color, sex, culture, social origin or condition, or political or religious ideas"); IV Mont. Const. Conv., Verb. Tr. 1849 (rejecting specific constitutional protection for same-sex couples).

The controlling inquiry for suspect class status under current Montana law, as Plaintiffs explain, is whether a class has been subjected to "purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection from the majoritarian political process." In re C.H., 210 Mont. 184, 198, 683 P.2d 931 (1984). Contrary to Plaintiffs' implication, the Montana Supreme Court addresses this constitutional inquiry as a question of law determined by the courts, not a question of fact determined by their experts' testimony. Pls' Br. at 24.

It is undisputed that gays and lesbians have been subject to private prejudice, discrimination, and violence in Montana. See Pls' Br. Ex. 1, State's Resp. to Pls' First Disc. Requests. But to the extent Prof. Chauncey's sweeping review of sexual orientation discrimination over the centuries bears on the question of purposeful unequal treatment by the State, it sweeps too broadly: he has concluded that the Montana Constitution itself is discriminatory, which undermines rather than reinforces Plaintiffs' claims of fidelity to constitutional meaning. See Chauncey Aff. ¶ 81. Professor Chauncey's criticism of the Montana Constitution does not make it any less binding. Still, unlike his testimony about the California Constitution in Perry, he does not cite any expressed animus underlying the approval of CI-96. Compare Perry, 704 F. Supp. 2d at 988 ("Proposition 8 Official Voter Guide evoked fears about and contained stereotypical images of gay people") with State's

Br. Ex. A (CI-96 Official Voter Information Pamphlet). Despite Prof. Chauncey's exhaustive analysis, Plaintiffs have yet to identify a single instance of any targeted State action against them that they ask the Court to review and invalidate.

Plaintiffs also admit that "lesbian and gay advocates have made modest political gains both in Montana and around the country," which controverts their claim that "they can achieve neither equality nor other legal protections through the political process." Pls' Br. at 8. Senator Kaufmann, a leading advocate of gay and lesbian rights in Montana for two decades, identifies less than a dozen legislators associated with potential animosity toward gay and lesbian Montanans, only seven of whom made any comments that could be construed as expressing animus. Kaufmann Aff. ¶¶ 3, 9, 10, 34, 49, 51, 53, 56, 59. As a constitutional matter, the Legislature acts through its laws, not through the isolated statements of a few of its members during speech and debate. See Mont. Const. art. V, § 8.

More importantly, except for a prohibition of marriage between persons of the same sex that Plaintiffs do not challenge, none of the bills they describe as opposing gay and lesbian rights passed. Meanwhile, for more than a decade, the executive branch under three different Governors of different parties has prohibited discrimination on the basis of sexual orientation in state employment and in certain state programs. Mont. Admin. R. 2.21.3702 & 4002 (sexual orientation anti-discrimination policy); Mont. Admin. R. 2.21.4012 & 4013 (sexual harassment policy protects against harassment because of a person's sexual orientation); Mont. Admin. R. 20.9.620 (sexual orientation anti-discrimination policy in juvenile detention facilities); Mont. Admin. R. 23.12.305

(prohibition on collection of criminal intelligence information exclusively regarding sexual orientation); Mont. Admin. R. 24.154.2301 (sexual orientation anti-discrimination policy for addiction counselors); Mont. Admin. R. 24.189.810 & 2309 (sexual orientation anti-bias policy for psychologists). For purposes of the suspect class analysis, these actions by statewide elected officials are a surer measure of political standing than the words of a few legislators.

Still, even Prof. Chauncey acknowledges that the Legislature has been responsive to arguments sounding in gay and lesbian rights. See Chauncey Aff. ¶ 71; see also 1997 Mont. L. ch. 298 § 13, codified at Mont. Code Ann. § 33-20-313 (prohibiting sexual orientation discrimination in certain insurance policy transactions). More recently, two of Montana's largest cities have supported gay and lesbian rights. Missoula passed an amendment adding sexual orientation to the city's anti-discrimination ordinance. See Missoula City Code § 9.64.010, et seq. The Bozeman City Commission unanimously resolved to support Plaintiffs' claims for spousal benefits in this very case. See Bozeman City Comm'n, Resolution No. 4291 (Sept. 27, 2010). Senator Kaufmann attests that after the 2010 election, another "out" legislator will join her in the 2011 Session, the third this decade. Kaufmann Aff. ¶ 17. In other words, while gay and lesbian advocates have so far failed to achieve domestic partnerships and were unsuccessful in opposing the Marriage Amendment, they too have benefitted from the "majoritarian political process" Plaintiffs' claim is cut off from them.

The recognition of a new class of non-spousal domestic partnerships in other States over the past decade further suggests that whatever structural obstacles to political

action by gay and lesbian advocates that may have existed have fallen. See Pls' Br. at 10; see A.B. No. 205 (Cal. 2003); S.B. 1716 (Ill. 2010); S.B. 283 (Nev. 2009); P.L. 2003, ch. 246 (N.J. 2003); P.L. 2006, ch. 103 (N.J. 2006); 2007 Ore. Laws ch. 99 (2007); 2007 Wash. Laws ch. 156 (Wash. 2007). The fact that the Legislature has not also enacted laws similar to these relatively recent laws, many of which were enacted after a decade or more of futility in those states, is therefore not evidence that Montanans are closed to further discussion of gay and lesbian rights.

None of this means to detract from the horrific insults and crimes Senator Kaufmann has experienced or describes in her affidavit. Kaufmann Aff. ¶¶ 18-30. But it does suggest that these are the words and acts of a vocal minority rather than a structural majority, and that popular opinion in Montana is more fluid and receptive to gay and lesbian rights than Plaintiffs suggest. For example, for more than a decade a wide majority of Montanans have agreed that violence against gays and lesbians should be considered a hate crime. Wilson Aff. ¶ 3(a). In just the past year, a plurality of Montanans have come to support repeal of the "Don't Ask, Don't Tell" policy concerning gay and lesbian service members in the military. Wilson Aff. ¶ 3(b). Last week both of Montana's U.S. Senators voted to end it. See 156 Cong. R. S10684 (daily ed. Dec. 18, 2010) (Rollcall Vote No. 281). Even opposition to same-sex marriage has fallen from a two-thirds supermajority when CI-96 was enacted, to a bare majority this year. Wilson Aff. ¶ 3(c). Today, a majority or plurality of Montanans under age 49 support legalization of same-sex marriage. Wilson Aff. Ex. D at 14. Given this, it cannot be said that these majorities or near-majorities of Montanans are in "such a position of political

powerlessness, as to command extraordinary protection" for their interests under the suspect class doctrine. Matter of C.H., 210 Mont. at 198.

D. Spousal Benefits Satisfy Equal Protection Scrutiny.

Heightened scrutiny, therefore, does not apply here. If it did, however, the State's interest in preserving a single classification of couples as spouses within marriage is sufficient to withstand it. Plaintiffs make no serious effort to address Snetsinger, which recognized the extent of the State's interest in defining marriage and preserving it from dilution by other arrangements short of marriage. See id. at ¶¶ 24, 27. Plaintiffs also ignore the Montana Constitution itself, which recognizes civil marriage as it is expressed in Montana law to be not just a compelling but a constitutionally grounded interest. Mont. Const. art. XIII, § 7; see also State's Br. Ex. A at 23 (Argument for CI-96). At the same time, Plaintiffs cite authority holding that relegating same-sex couples to sub-marital arrangements is itself a violation of equal protection. Pls' Br. at 25-26. This is another constitutionally compelling interest in preserving spousal benefits for spouses, and avoiding separate (and, according to Plaintiffs' authorities, unequal) sub-marital arrangements. Again, Plaintiffs' equality-based arguments for spousal benefits lead them into direct conflict with the Marriage Amendment.

Perforce, spousal benefits also satisfy rational basis review. Plaintiffs' argument that the so-called "exclusion of same-sex couples" from spousal benefits is "an historical artifact, grounded in prejudice and antipathy toward gay, lesbian, and bisexual Montanans," is an argument against the Montana Constitution's definition of a spouse,

and not the spousal benefits laws themselves. As to those laws, Plaintiffs have not produced any evidence that those laws were motivated by animosity toward gays and lesbians. Instead, Plaintiffs rely on the Legislature's failure to pass other laws that are not at issue. Pls' Br. at 26-27. But the rational basis cases they rely upon require a showing that animus toward a disfavored group is expressed by the laws that are challenged, not by bills that never passed. See Romer v. Evans, 617 U.S. 620, 632 (1996) (law at issue was an "invalid form of legislation" because it "has the peculiar property of imposing a broad and undifferentiated disability on a single named group").

Those laws, the spousal benefit laws actually at issue, are contemporary with or predate the constitutional provisions Plaintiffs sue under and contain no taint of animus toward gays and lesbians as a class. See, e.g., 1895 Mont. Civ. Code § 210 (describing marriage as "[h]usband and wife"); 1975 Mont. L. ch. 536, § 4 ("Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential"). It is absurd, for example, to claim that Montana's adoption of the Uniform Probate Code by the first Legislature to meet under the 1972 Constitution was an act of "[d]isadvantaging one group of its citizens simply for the sake of disadvantaging them." Pls' Br. at 27; 1974 Mont. Laws, ch. 365, § 91A-2-102; cf. Pls' Br. at 10 n. 5. The primary law that prevents same-sex couples from becoming spouses is the Marriage Amendment, a law that these Plaintiffs do not challenge here.

III. NO OTHER CONSTITUTIONAL RIGHTS ARE AT ISSUE.

Plaintiffs agglomerate their remaining claims into a vague assertion that the State's provision of spousal benefits to married couples "constitutes an unconstitutional burden on Plaintiffs' rights of privacy, dignity, and pursuit of life's basic necessities, safety, health, and happiness." Pls' Br. at 28. The problem with this assertion, as with their equal protection claim, is that the burden imposed upon them is on account of their status as non-spouses, not because of their private lives. More importantly, however, the burden they claim from being "excluded" from spousal benefits is not due to any identified state action, see State's Br. at 6-7, but instead is attributable to the Constitution itself.

The public provision of spousal benefits under Montana law is not a matter of privacy. Plaintiffs already enjoy "intimate association with a same-sex life partner," and have the freedom to enter a variety of private arrangements to protect that relationship. Pls' Br. at 29. "[W]hat is at issue in this case is [Plaintiffs'] entitlement to certain legislatively created benefits," which the Supreme Court has been careful not to confuse with the fundamental rights "to privacy and liberty." Powell v. State Fund, 2000 MT 321, ¶ 21, 302 Mont. 518, 15 P.3d 877. The Montana Constitution does not demand public subsidy of private conduct.

Instead, the right recognized in Gryczan and Armstrong is, like most rights recognized in the Declaration of Rights, a negative right "of protection from governmental interference." Gryczan v. State, 283 Mont. 433, 451 942 P.2d 112 (1997); see also Armstrong v. State, 1999 MT 261, ¶ 14, 989 P.2d 364 (privacy "guarantees each

individual the right" to be "free from government interference"); Jeannette R. v. Ellery, 1995 Mont. Dist. LEXIS 795, *24 (1st Dist. May 22, 1995) (right to equal funding of constitutionally protected abortion arises from "the right to be left alone"). Spousal benefits provided to married couples, therefore, do not burden any "constitutionally protected decision through the coercive use of selectively provided statutory protections," at least if the word "coercive" retains any meaning. Pls' Br. at 34.

Similarly, there is no inalienable right to public spousal or domestic partnership benefits, as there may be to private employment in certain cases. Plaintiffs have enjoyed long and successful careers of their choosing, including in some instances employer-provided domestic partnership benefits, without government-imposed prohibitions of the kind invalidated in Wadsworth. See Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165 (1996); see also Leslie Aff. ¶ 6, Haugland Aff. ¶ 6, Long Aff. ¶ 6, Parker Aff. ¶ 4; cf. Owens Aff. ¶ 9, Williams Aff. ¶ 6. And for the reasons discussed above and in the State's opening brief, State's Br. at 17, the provision of spousal benefits to spouses, as defined by the Montana Constitution and reflected in dozens of laws, is not an "unreasonable, arbitrary or capricious action against an individual" prohibited by the due process guarantee. Pls' Br. at 35.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to grant the State's motion to dismiss, and deny Plaintiffs' motion for summary judgment.

Dated this 27th day of December, 2010.

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CERTIFICATE OF SERVICE

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